No. 91-158

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In The

Supreme Court of the United States

October Term, 1991

CHARLES FRUHWIRTH,

Petitioner,

vs

BALTIMORE CITY POLICE DEPARTMENT,

-and-

EDWARD V. WOODS, COMMISSIONER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Should a federal district court refuse to apply the abstention doctrine set forth in *Younger v. Harris* when a police officer lodges a first amendment challenge to a departmental administrative disciplinary hearing, in a situation in which the Department has instituted preliminary formal proceedings, but the accused officer has no knowledge of these proceedings until the time he seeks relief in federal court?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

On May 25, 1990, the United States District Court for the District of Maryland entered a memorandum opinion wherein the court denied petitioner's Motion for Injunctive Relief and

dismissed his complaint. The memorandum opinion and order are reproduced at 4a.

On April 25, 1991, the United States Court of Appeals for the Fourth Circuit issued an unpublished opinion and judgment affirming the judgment of the United States District Court for the District of Maryland. The opinion and judgment are reproduced at 1a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered a judgment affirming the judgment of the United States District Court for the District of Maryland on April 25, 1991. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. XIV, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

> any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Charles Fruhwirth, is a police officer employed by the Baltimore City Police Department. On August 25, 1988, the Internal Investigation Division (IID) of the Department issued a report that sustained charges of misconduct against Fruhwirth. The charges related to an off-duty comment Fruhwirth made to his wife about the manner in which a Southwest District dispatcher handled his inquiry regarding a police surveillance in the area of the Fruhwirth home. The comment was inadvertently transmitted to a departmental dispatcher over Fruhwirth's speaker phone, which Fruhwirth thought had been disconnected at the conclusion of the telephone call. Fruhwirth was served with departmental charges and notified that a disciplinary hearing would be set for a later date. The disciplinary hearing was set for September 12, 1989. At no time prior to August 25, 1988 did Fruhwirth have any knowledge of the allegations against him, nor did he know about the investigation conducted by IID. The Department made no attempt to take a statement from Fruhwirth at any time during the course of the investigation, or otherwise notify Fruhwirth of the investigation or pending charges.

On August 17, 1989, Fruhwirth filed a Complaint with the United States District Court for the District of Maryland seeking declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 1983. Jurisdiction was conferred by 28 U.S.C. §§ 1331, 1343(a)(3) and (a)(4), and 18 U.S.C. § 401. No proceedings or other administrative action had occurred in

the intervening year. In his complaint, Fruhwirth alleged, *inter alia*, that his expression of disapproval with the manner in which his emergency telephone call was handled by the Department is speech constitutionally protected by the First and Fourteenth Amendments to the United States Constitution. Fruhwirth further alleged that should the Department be permitted to hold a disciplinary hearing and discipline Fruhwirth for the lawful exercise of his constitutionally protected rights, the very conducting of such a hearing would violate Fruhwirth's constitutional rights.

On September 14, 1989, the Department filed a motion to dismiss on grounds unrelated to abstention. Subsequently, on March 8, 1990, the Department filed a supplemental motion to dismiss wherein the Department requested the district court to abstain from hearing Fruhwirth's claim and to dismiss the complaint.

A motions hearing was held before the district court on March 16, 1990. On May 25, 1990 the district court dismissed the complaint based on the abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. The district court held that abstention was appropriate since: (1) there existed an ongoing state administrative proceeding, (2) the state proceeding involved the control and discipline of police officers, an important state interest; and (3) Fruhwirth could seek judicial review of the decision rendered by the police administrative board in the state circuit court, with subsequent appeals available to him within the state court system.

Fruhwirth filed a timely appeal to the United States Court of Appeals for the Fourth Circuit. Fruhwirth alleged that the district court had improperly relied on the abstention doctrine set forth in *Younger*, and asserted four arguments in support thereof: (1) that the action threatened by the Department was patently unconstitutional; (2) that there were no ongoing state

proceedings; (3) that the state proceedings were not judicial in nature and would not provide an adequate opportunity for Fruhwirth to raise constitutional challenges; and (4) that there was no important state interest involved. The fourth circuit affirmed the opinion of the district court and held that the lower court's determination that leaving the matter in state hands would serve an important state interest was appropriate.

REASONS FOR GRANTING THE WRIT

A FEDERAL DISTRICT COURT SHOULD REFUSE TO APPLY THE ABSTENTION DOCTRINE SET FORTH IN *YOUNGER V. HARRIS* WHEN A POLICE OFFICER LODGES A FIRST AMENDMENT CHALLENGE TO A DEPARTMENTAL ADMINISTRATIVE DISCIPLINARY HEARING, IN A SITUATION IN WHICH THE DEPARTMENT HAS INSTITUTED PRELIMINARY FORMAL PROCEEDINGS, BUT THE ACCUSED OFFICER HAS NO KNOWLEDGE OF THESE PROCEEDINGS UNTIL THE TIME HE SEEKS RELIEF IN FEDERAL COURT.

The instant case is factually distinct from any case in which a federal court has relied upon the abstention doctrine set forth in *Younger v. Harris* to abstain from hearing a litigant's claim. Further, the decision below, holding that it was appropriate for the district court to abstain from hearing Fruhwirth's first amendment challenge to the departmental administrative disciplinary hearing, threatens to unduly broaden the abstention doctrine, and further threatens to deny certain individuals the opportunity to raise first amendment challenges in federal court.

A. This Case Is Factually Distinct From Any Case in Which a Federal Court Has Relied Upon the *Younger* Abstention Doctrine to Abstain From Hearing a Litigant's Claim and Is Therefore a Case of First Impression.

In the decision below, the fourth circuit held that it was appropriate for the district court to rely on the abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971), and thereby abstain from hearing petitioner Fruhwirth's first amendment challenge to a Baltimore City Police Department administrative disciplinary hearing. This Court has previously set forth a three part analysis to be undertaken in determining whether *Younger* abstention is appropriate. First, the court must consider whether there exists a state proceeding which constitutes an ongoing judicial proceeding. Next, the court must decide whether the state proceedings implicate important state interests. Finally, the court must ascertain whether the state proceedings provide an adequate opportunity to raise constitutional challenges. *See Middlesex Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

It is the first of these three prongs which is of particular relevance to the instant case. In the decision below, the fourth circuit affirmed the district court's determination that the formal action taken by the Baltimore City Police Department in conducting an investigation of the allegations asserted against Officer Fruhwirth amounted to an ongoing state judicial proceeding. However, the facts of this case are distinct from those to which the *Younger* doctrine has been applied.

The Court in *Younger* held that absent extraordinary circumstances, federal courts should not enjoin pending state criminal prosecutions. That decision was based primarily on the notion of "comity," or the "proper respect for state functions." *Id.* at 44. Since the decision in *Younger*, however, *Younger* abstention has been applied to situations in which federal claims "have or could be presented in ongoing state judicial proceedings that concern important state interests." *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225, 1228 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 1923 (1990), *citing Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237-38 (1984) and *Middlesex County Ethics*

Committee v. Garden State Bar Ass'n, 457 U.S. 423, 432-437 (1982).

The issue in *Telco Communications, Inc. v. Carbaugh* was whether the *Younger* doctrine should apply to a particular civil administrative proceeding. The Virginia Office of Consumer Affairs (OCA) had advised Telco that it was investigating the plaintiff's fundraising activities in Virginia pursuant to a complaint it had received. *Id.* at 1227. Telco filed suit in the Eastern District of Virginia seeking to enjoin the OCA from enforcing certain provisions of the Virginia charitable solicitation laws. *Id.* The defendant requested the district court to abstain from exercising jurisdiction because of the ongoing state administrative proceedings against Telco. The district court denied the defendant's motion. *Id.* The fourth circuit found that Telco's action did not disrupt any ongoing state proceeding, and therefore the district court properly exercised jurisdiction in hearing Telco's constitutional challenge. *Id.* at 1228-30.

At first glance, it is arguable that the Baltimore City Police Department, by virtue of the formal investigation conducted by IID, had initiated formal proceedings with regard to the complaint filed against Officer Fruhwirth, and therefore, the decision in *Telco*, holding that abstention was inappropriate where there was no ongoing state proceeding, is inapplicable. However this case is factually similar to *Telco* in that, even though the Department had undertaken formal investigative proceedings, it had not yet held the formal disciplinary hearing. The *Telco* court held that "the period between the threat of enforcement and the onset of formal enforcement proceedings may be an appropriate time for a litigant to bring its First Amendment challenges in federal court." *Id.* at 1229. What remains unclear, however, is exactly what constitutes "formal enforcement proceedings."

The instant case may again be distinguished from *Telco* in that Telco, once it learned that the OCA was investigating its

activities, requested a meeting with OCA, pursuant to which an " 'informal fact-finding conference' " was held. *Id.* at 1228. The *Telco* court found abstention inappropriate because this conference was not a "formal hearing in conformance with the Commonwealth's Administrative Process Act . . . " *Id.* at 1228.

In light of the policy behind abstention generally, however, the instant case actually may present a more compelling situation for exercising jurisdiction than *Telco*. Not only was Fruhwirth excluded from the Department's fact-finding process, but he was also denied any knowledge of the allegations against him. Fruhwirth was not aware of the allegations asserted against him, or of the investigation conducted by IID, until the time he was served with departmental charges. Prior to any further administrative action, Fruhwirth sought injunctive relief in federal court. There were no informal discussions, as in *Telco*, let alone any formal proceedings.

This is not a situation where an accused simply finds himself disenchanted with ongoing state proceedings and seeks to have the federal courts intervene to rescue him. Rather, this is a situation where a litigant seeks to challenge the very existence of the administrative action on first amendment grounds, and seeks that opportunity prior to the onset of that action. However, in those cases in which federal courts have determined that, by virtue of ongoing state proceedings, *Younger* abstention is appropriate, the accused party sought relief in federal court only after becoming aware of the initiation of state proceedings, if not participating therein.

For example, in *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619 (1986), the Supreme Court found abstention proper where the accused brought suit in federal court after the Ohio Civil Rights Commission had initiated formal administrative proceedings. *Id.* at 2722-24. However, prior to the

initiation of these proceedings, the Commission had warned Dayton that failure to accede to a proposed Conciliation Agreement and Consent Order, or, in the alternative, to submit an acceptable counteroffer, would result in the Commission's initiation of formal proceedings. Fruhwirth, on the other hand, had absolutely no knowledge of the formal investigative proceedings conducted by IID until the Department decided to file charges against him.

The facts in *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), offer another example. In *Middlesex*, the court abstained where it found that an attorney, prior to the commencement of federal action, had been served with a detailed formal statement of charges for which he was required to file an answer within ten days. *Id.* at 2524. The accused attorney, however, received a letter from the Ethics Committee at the onset of the investigation, and therefore he was aware that the Committee was investigating allegations against him. In the instant case, the Department took no steps to advise Fruhwirth that a complaint had been filed against him, or that an investigation was underway. Likewise, in *Christ the King Regional High School v. Culvert*, 815 F.2d 219 (2nd Cir.), *cert. denied*, 484 U.S. 830 (1987), the appellant, prior to seeking an injunction in federal court, was served with a complaint and filed an answer in response. In the instant case, Fruhwirth took no steps to further the state proceeding. Fruhwirth was in no way involved in the departmental investigation, nor did he express his position to the Department at any time. In fact, the Department did not even take a statement from Fruhwirth.

The applicability of the abstention doctrine in the instant case cannot be measured by *Younger* and its progeny. The investigation conducted by IID arguably constitutes an ongoing state proceeding. That notwithstanding, Officer Fruhwirth had no knowledge of this proceeding. If a state agency is allowed to

keep silent as to its investigation and preparation of charges in an effort to avoid federal court review, then the abstention doctrine may take on a function not intended by the courts. The applicability of the *Younger* doctrine to a situation where there exists a unilateral state proceeding has not yet been adjudicated. This is a case of first impression, the facts of which strongly urge this Court to set forth a new analysis.

B. The Decision Below, Holding That It Was Appropriate for the District Court to Abstain From Hearing Petitioner's First Amendment Challenge to the Department's Administrative Disciplinary Hearing, Threatens to Unduly Broaden the Abstention Doctrine Set Forth in *Younger v. Harris*, and Threatens to Deny Certain Individuals the Opportunity to Raise First Amendment Challenges in Federal Court.

In *Telco*, the fourth circuit expressed concern as to the continuing expansion of the *Younger* abstention doctrine:

> The doctrine of *Younger* abstention has progressed over the past two decades to protect state criminal proceedings . . . state civil cases . . . and state administrative process . . . from premature federal interference. To follow the doctrine, however, as one would a pied piper, is to forsake the Supreme Court's rulings on constitutional rights.

Telco, 885 F.2d at 1230. The *Telco* court, while acknowledging the importance of state interests, found that the strength of those interests would be respected by any court assessing a plaintiff's constitutional claims. *Id.* at 1229. As a result, the *Telco* court held that the period between the threat of enforcement and the onset of formal enforcement proceedings may be an appropriate time for a litigant to bring his first amendment challenges in federal court. *Id.* The accuracy of this analysis has never been addressed by the Supreme Court.

In the instant case, considering that the courts below have deemed that the investigation conducted by IID amounts to an ongoing state judicial proceeding, there existed no period between the threat of enforcement and the onset of formal enforcement proceedings, as in *Telco*. Fruhwirth received notice of the onset of formal enforcement proceedings at the same time he received notice of the threat of such proceedings. That is, it was not until the time at which departmental charges were served upon Fruhwirth that he had knowledge that the threat of enforcement existed.

The fourth circuit has held that Fruhwirth has absolutely no right to assert a first amendment challenge in federal court. *Telco* suggests that, had Fruhwirth been advised that departmental charges were pending, that is, that enforcement proceedings were threatened, he could have filed a federal claim. However, the decision below leaves Fruhwirth with no such opportunity. Fruhwirth filed in federal court at the first opportunity available to him. This opportunity did not arise, however, until after the Department had initiated formal proceedings, and after the period of threatened enforcement had expired. Because *Telco* is not a decision of this Court, guidance and clarification by this Court as to the appropriate standard in a case such as this is warranted.

Unless this Court sets forth a clearer standard, one that is applicable to situations such as the instant case where there is no period of threatened enforcement proceedings, federal courts will be free to abstain in virtually any case as long as the state has instituted some type of formal proceeding. If this is the case, individuals such as Fruhwirth will be denied the opportunity to assert first amendment challenges in federal court. This Court has held that abstention is particularly inappropriate where the plaintiff has alleged a violation of his first amendment freedoms. *Hotel and Restaurant Emp., Etc. v. Danzinger*, 536 F. Supp. 317 (1982), *aff'd*, 832 F.2d 263 (1987), *citing Cameron v. Johnson*,

390 U.S. 611 (1968); *Zwickler v. Koota*, 389 U.S. 241 (1967); *Dombrowksi v. Pfister*, 380 U.S. 479 (1965). Abstention in this case completely denies Fruhwirth the opportunity to assert a first amendment challenge in federal court.

CONCLUSION

For the foregoing reasons, the petitioner Charles Fruhwirth respectfully requests that a writ of certiorari be issued to review the opinion of the fourth circuit.

Respectfully submitted,

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WEINER, P.A.
Attorneys for Petitioner

APPENDIX A — UNPUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED APRIL 25, 1991

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-1495

CHARLES FRUHWIRTH,

Plaintiff-Appellant,

versus

BALTIMORE CITY POLICE DEPARTMENT; EDWARD V. WOODS, Commissioner,

Defendants-Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Marvin J. Garbis, District Judge. (CA-89-2359-MJG)

Argued: March 5, 1991 Decided: April 25, 1991

Before ERVIN, Chief Judge, MURNAGHAN, Circuit Judge, and BRITT, United States District Judge for the Eastern District of North Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: Michael Lawrence Marshall, SCHLACHMAN, BELSKY AND WEINER, P.A., Baltimore, Maryland, for Appellant. William Rowe Phelan, Jr., Senior Solicitor,

Appendix A

DEPARTMENT OF LAW, Baltimore, Maryland, for Appellees. ON BRIEF: Herbert R. Weiner, SCHLACHMAN, BELSKY AND WEINER, P.A., Baltimore, Maryland, for Appellant. Neal M. Janey, City Solicitor, DEPARTMENT OF LAW, Baltimore, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

The plaintiff-appellant, Charles Fruhwirth, a Baltimore City police officer, seeks to enjoin a hearing on disciplinary charges lodged against him following a telephone conversation which he had initiated. The call was to the dispatcher at the Southwest District of the Baltimore City police department. Fruhwirth, feeling the dispatcher was unhelpful, and also thinking that he had terminated the call, had unburdened himself of remarks about the dispatcher. Actually, the line remained open and Fruhwirth was overheard and recorded by the dispatcher. He used one scatological term, and suggested, in crude, uncomplimentary terms, that the dispatcher was of African origin.

District Judge Marvin J. Garbis, in a succinct yet comprehensive opinion, and despite cries that First Amendment Constitutional guarantees of the exercise of the rights of free speech were being punished, has applied the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), to abstain from granting the requested injunctive relief. He felt it preferable to leave the matter to state administrative and judicial proceedings.

We affirm the opinion of the district court, *Fruhwirth v. Baltimore City Police Dep't*, No. 89-2359 (D. Md., May 25, 1990),

wherein it is observed that leaving the matter in state hands would serve "an important state interest." That avoided, on behalf of comity, the resolution of the tangled question of whether Fruhwirth's case presents one of those relatively rare occasions when "free speech" may be *too free* to merit constitutional protection (*e.g.*, the false cry of "Fire" in a crowded theatre).

The judgment is accordingly

AFFIRMED.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DATED MAY 25, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. MJG-89-2359

CHARLES FRUHWIRTH

Plaintiff

vs.

BALTIMORE CITY POLICE DEPT., et al.

Defendants

MEMORANDUM OPINION

Plaintiff, Charles Fruhwirth, an officer of the Baltimore City Police Department, seeks to enjoin the Department and its Commissioner from conducting an administrative hearing regarding disciplinary charges made against him, and he further asks the Court to order the dismissal of those charges. Plaintiff alleges that the Defendants are denying him his rights guaranteed by the United States Constitution and by the Maryland "Law Enforcement Officers' Bill of Rights," codified at Md. Ann. Code art. 27, § 727 *et seq.* (1988). Plaintiff has moved for a Preliminary Injunction and Temporary Restraining Order, and Defendants have filed a Motion to Dismiss.

In his Complaint, Plaintiff alleges that the Department's charges relate to a telephone conversation which took place on

Appendix B

August 12, 1988.[1] Plaintiff, while at home and off duty, was informed by his wife that police cars had been in the area of his home shining spotlights into the house and backyard. Plaintiff called the Southwestern District dispatcher to determine why this was occurring and possibly to offer assistance. The dispatcher on duty, apparently from the Complaint a black woman, did not indicate that the conversation was being recorded by the Department's phone system, although it is customary for such an indication to be made at the outset of a call. After the dispatcher told Plaintiff that she could not help him, Plaintiff believed that the conversation was complete and hung up his telephone receiver. Unknown to the Plaintiff, his speaker phone was still on and the dispatcher remained on the line. At least twenty seconds after hanging up the receiver, Plaintiff expressed to his wife his outrage at the manner in which his call had been handled by the dispatcher. Among the words used was reference to a sexual act and a racial epithet. Plaintiff was not aware that his statements were audible to the dispatcher and were being recorded. The next day, the dispatcher filed a complaint against Plaintiff with the Department's Internal Investigation Division ("IID") for the use of profanity and racial slurs. On August 25, 1988 the IID issued a report which sustained misconduct charges against Plaintiff. Absent relief from the Court, a trial-type board hearing will be held, after which Plaintiff may be subjected to disciplinary action by the Police Commissioner.

Plaintiff contends that this Court should enjoin the Baltimore City Police Department from conducting the trial board hearing in this matter. Plaintiff claims that the administrative proceeding involves an action under color of state law which would deprive

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1. For purposes of this Motion all allegations in the Complaint are assumed to be true.

him of constitutionally protected rights, an action which would entitle him to relief in this Court under 42 U.S.C. § 1983. In essence, Plaintiff contends that there is a substantial likelihood that the statements overheard by the dispatcher are subject to constitutional protection and that he cannot legally be punished for the exercise of his right to free speech.

Initially, this court must determine whether it can, and should, exercise jurisdiction to hear the case. The principal issue is whether this Court should abstain from exercising jurisdiction under the doctrine originally announced by the Supreme Court in *Younger v. Harris*, 401 U.S. 37 (1971). As noted in *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225 (4th Cir. 1989):

> Under *Younger v. Harris*, 401 U.S. 37 (1971), federal courts should abstain "whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237-38 (1984); *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432-37 (1982). Important to *Younger* abstention is the existence of an ongoing state proceeding. If such a proceeding exists, "reinstituting the action in the federal courts" is impermissible; indeed to do so would involve a loss of time and duplication of effort. *Wulp v. Corcoran*, 454 F.2d 826, 831 (1st Cir. 1972).

Id. at 1228. Although the circumstances in *Telco* did not warrant abstention because there was no pending state proceeding, here an ongoing state administrative proceeding is being delayed by this case.

Appendix B

As stated recently by Judge Walter E. Black, Jr. of this Court in *Chesapeake B & M, Inc. v. Cassilly*, 729 F. Supp. 1106 (D. Md. 1990):

> *Younger* and its progeny "espouse a strong policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex County Ethics Comm.*, 457 U.S. at 431. This policy is based upon notions of comity which include proper respect for state functions and "the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* at 431.

Id. at 1108. Although *Younger* originally addressed abstention from state criminal proceedings, *Younger* abstention has subsequently been extended to state administrative and disciplinary proceedings. *See, e.g., Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982) (state bar disciplinary proceedings); *Ohio Civil Rights Commission v. Dayton Christian Schools*, 106 S. Ct. 2718 (1986) (sex discrimination proceeding before the Ohio Civil Rights Commission).

Applying *Ohio Civil Rights Commission v. Dayton Christian Schools*, the Second Circuit articulated three questions that must be resolved to determine if abstention is proper: "(1) whether there is an ongoing state proceeding; (2) whether an important state interest is involved; and (3) whether the federal plaintiff has an adequate opportunity for judicial review of his constitutional claims during or after the proceeding." *Christ the King Regional High School v. Culvert*, 815 F.2d 219, 224 (2d Cir. 1987). In this case, a state administrative proceeding is ongoing, and it involves

an important state interest, the control and discipline of police officers. Finally, judicial review of a decision of a police administrative panel is available in the Circuit Court, pursuant to Md. Ann. Code art. 27 § 732 (1988), with subsequent appeals available within the state court system. These courts are certainly well able to hear and decide any constitutional claims that may arise during the administrative proceeding.

The interference of the United States District Court with this administrative process appears totally unjustified. While the matter is certainly important to the Department and to Mr. Fruhwirth, it does not raise issues which would justify this Court's blocking the established administrative procedure and subsequent review by the Maryland state courts. This Court emphasizes that it is making no comment whatsoever on the merits of Mr. Fruhwirth's First Amendment claim. In this Court's view, that is a matter which should first be considered by the administrative trial board and, if appropriate, by the Maryland courts.

For the reasons stated above, the Plaintiff's motions for injunctive relief will be denied and the Complaint in this action will be dismissed by separate Order.

s/ Marvin J. Garbis
Marvin J. Garbis
United States District Judge

Date: May 25, 1990

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. MJG-89-2359

CHARLES FRUHWIRTH

Plaintiff

vs.

BALTIMORE CITY POLICE DEPT., et al.

Defendants

ORDER

For the reasons set forth in the Memorandum Opinion filed this date:

1. Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order is hereby DENIED.

2. Defendants' Motion to Dismiss is GRANTED.

3. Judgment is hereby entered for the Defendants and against the Plaintiff, with costs.

4. The Clerk shall mail a copy of this Order and the accompanying Memorandum Opinion forthwith to counsel of record.

SO ORDERED this 25th day of May, 1990.

Appendix B

s/ Marvin J. Garbis
Marvin J. Garbis
United States District Judge

91-152

(2)

Supreme Court, U.S.
FILED
SEP 12 1991
OFFICE OF THE CLERK

No. 91-52

In The

Supreme Court of the United States

October Term, 1991

CHARLES FRUHWIRTH,

Petitioner,

v.

BALTIMORE CITY POLICE DEPARTMENT

and

EDWARD V. WOODS, COMMISSIONER,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Maryland, filed on May 25, 1990, was not reported. That opinion and that Court's order are reproduced in the appendix of the petition for writ of certiorari at page 4a.

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit, dated April 25, 1991, is reproduced in the appendix of the petition at page 1a.

STATEMENT OF THE CASE

The Respondent notes that the statement of operative facts in the Petition is basically drawn from the complaint filed in this case. A transcript of the telephone conversation between Officer Fruhwirth and Cadet Thompson was included in the Defendants' Memorandum in Opposition to Motion for Injunctive Relief and is included herein at App. 1.

On August 15, 1988, at 2:09 p.m., Officer Fruhwirth received and signed for a paper entitled "Notification to Accused of Complaints." This paper was given to Fruhwirth by the Internal Investigation Division as part of its routine for handling complaints and investigations. This document informed Fruhwirth of the nature of the complaint as follows:

> "It is alleged that on 13 Aug 88, while having a telephone conversation with Cadet Danier Thompson, communications division, you used profanity and racial slurs. This occured [sic] after you identified yourself as a police officer."

This Notification was given to Fruhwirth two days after the incident occurred and over a year before Fruhwirth filed his complaint in the district court. The text of the Notification to Accused of Complaints is included herein at App. 3.

REASONS FOR DENYING THE PETITION

The Petitioner presents for review a question which does not involve any special or important issues which would justify the issuance of a writ of certiorari. The decision of the Court of Appeals implicates none of the traditional grounds for certiorari jurisdiction. It does not conflict with decisions of other Courts of Appeals on the same subject; and it does not involve an important question of federal law which has not been, but should be, decided by this Court.

It should be noted that the Court of Appeals did not consider its decision to be of sufficient import to publish it. This means that the Court of Appeals' opinion did not satisfy any of that Court's standards for publication:

> "i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or
>
> ii. It involves a legal issue of continuing public interest; or
>
> iii. It criticizes existing law; or
>
> iv. It contains an historical review of a legal rule that is not duplicative; or

> v. It resolves a conflict between panels of this Court or creates a conflict with a decision in another circuit."

Internal Operating Procedures, 4th Cir., IOP 36.4. This also means that the decision has very little precedential value, if only because very few people will ever be able to read the opinion. Thus, its import on litigation on a national scale or even on a local scale will be minimal. Similarly, the district court's memorandum opinion was not published and for the same reasons it will not have an effect beyond this case.

More importantly, however, the Petitioner's argument is based on an erroneous statement of fact. When that statement is corrected, this case resumes the posture of an "average" abstention case which was correctly decided below and which does not merit consideration by this Court.

A. The Petitioner's argument is premised on an erroneous statement of fact as to the Petitioner's knowledge of the administrative proceedings.

The argument presented by the Petitioner is based solely on his lack of knowledge of the investigation prior to his being served with formal charges. Indeed, Fruhwirth states that he was

> " . . . denied any knowledge of the allegations asserted against him. Fruhwirth was not aware of the allegations asserted against him, or of the investigation conducted by IID, until the time he was served with departmental charges."

Petition, page 8.[1] Thus, Fruhwirth argues that because he had no knowledge of the charges, the district court should have entertained his challenge, which was filed shortly after service of the formal charges.

The most obvious problem with this argument is that it is a misstatement of fact. As a routine matter of procedure, the Internal Investigation Division (IID) notifies an officer when a complaint has been lodged against that officer. This is done by serving on the officer a form entitled "Notification to Accused of Complaints," for which the accused officer signs to evidence receipt.

On August 15, 1988, at 2:09 p.m., Officer Fruhwirth signed and received a Notification to Accused of Complaints, which informed him of the general nature of the complaint as follows:

> "It is alleged that on 13 Aug 88, while having a telephone conversation with Cadet Danier Thompson, communications division, you used profanity and racial slurs. This occured [sic] after you identified yourself as a police officer."

App. 3.[2]

It should be noted that this notification of the complaint and investigation was given to Fruhwirth only two days after the incident occurred. Thus, Fruhwirth knew

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[1] In the Complaint filed in the district court, there was no allegation as to when Fruhwirth became aware of the misconduct complaint and investigation.

[2] The Notification was not a part of the record below because Fruhwirth never before raised the precise issue of his knowledge of the complaint and investigation.

of the complaint, the nature of the accusation and the existence of the IID investigation for a full year prior to when he now claims in his Petition to have received his first knowledge of the complaint and investigation. Accordingly, he had a year within which to bring an action in the district court, had he wished to do so.

In *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225 (4th Cir. 1989), cited by the Petitioner, the Fourth Circuit opined that "the period between the threat of enforcement and the onset of formal enforcement proceedings may be an appropriate time for a litigant to bring its first Amendment challenges in federal court." 885 F.2d at 1229. In this case, Fruhwirth had a year-long period before he was served with formal charges; he could have used this time to bring his challenge in federal court as in *Telco, supra*.

It is clear, then, that the Petitioner's whole argument is based on an erroneous statement of fact. In attempting to present this Court with a unique factual situation which might merit consideration by this Court, the Petitioner has, at best, forgotten the notification of August 15, 1988. Once the erroneous statement is corrected, this case simply becomes an abstention case like many others. As such, it does not warrant review by this Court.

B. The courts below correctly applied the well-established law as to the *Younger* abstention concept of "ongoing state proceeding."

Far from breaking new ground, the courts below simply applied the well-established law with respect to abstention under *Younger v. Harris*, 401 U.S. 37 (1971), and

its progeny. This Court has set forth a three-part test (with added considerations) for determining whether abstention is appropriate.

A federal court is correct in abstaining from exercising its jurisdiction if there was (1) an ongoing state proceeding (2) which implicated important state interests and (3) which provided an adequate opportunity for the federal plaintiff to raise his constitutional challenges. *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). Bad faith or harassment make abstention inappropriate. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975). Similarly, satisfaction of the three requirements will not support abstention where a statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Id.; Younger v. Harris*, 401 U.S. 37, 53-54 (1971).

In his petition, Officer Fruhwirth deals only with the question of whether there was an ongoing state proceeding. The present case, rather than presenting a unique factual setting, fits in well with a long line of cases dealing with abstention. The courts below were correct in finding an ongoing state proceeding.

Middlesex Co. Ethics Comm., supra, 457 U.S. 423 (1982), involved lawyer disciplinary proceedings. In that case, the Ethics Committee conducted an informal investigation, then a more formal one. The Committee concluded that there was probable cause to believe that the attorney had violated two disciplinary rules and the lawyer was formally charged and served with the statement of

charges. Instead of filing an answer in accordance with the bar disciplinary procedures, the attorney filed suit in the U.S. District Court. *Id.* at 428-429. That court's abstention dismissal was affirmed by this Court, which found an ongoing state proceeding. *Id.* at 433-434.

Similarly, in *Dayton Christian Schools*, 477 U.S. 619 (1986), *Younger* abstention was held proper in a case where the plaintiff brought its federal suit after the agency had initiated administrative proceedings by the filing of a formal complaint which the plaintiff answered. *Id.* at 624. Since the administrative proceeding had reached the stage of the filing of the agency's formal complaint (after an investigation), the proceeding was ongoing and this Court held that the district court should have abstained.

The same basic pattern and result are found in *University Club v. City of New York*, 842 F.2d 37 (2d Cir. 1988) In that case the city's Human Rights Commission began an informal investigation which led to the filing of a formal complaint by the commission. A formal investigation resulted in a finding of probable cause and an invitation to a conciliation meeting. When the subject club did not respond, the commission referred the case to the commission's hearings division. *Id.* at 39. After the filing of the formal complaint and during the formal investigation, the club resorted to the federal district court, which dismissed the claims on the merits. The Second Circuit, finding an ongoing state proceeding, held that the district court should have abstained under *Younger*. *Id.* at 40, 41.

The common thread running through all these cases is that the federal plaintiffs brought their actions after the

formal initiation of administrative proceedings. This was the point made by the Fourth Circuit in *Telco Communications, Inc.*, 885 F.2d 1225 (4th Cir. 1989). In that case, an investigation had taken place, followed by an informal fact-finding and settlement conference. *Id.*, 885 F.2d at 1228. The Court pointed out that the administrative agency never initiated the formal hearing process or requested a formal prosecution. Therefore, the administrative proceeding had not yet truly begun.

In the present case, however, after the initial complaint notification to Fruhwirth, and investigation, Fruhwirth was formally charged and notified of the trial board hearing date. As of that point, the administrative proceeding had officially begun and there was nothing for either party to do other than to participate in the formal hearing, which would be an adversarial proceeding involving true adjudication and thus "judicial" in nature. Clearly then, there was an ongoing state proceeding in accord with the holdings of the cases cited above. Therefore, the first prong of the test for *Younger* abstention was satisfied and the courts below ruled correctly. There is nothing in this case to warrant this Court's devoting its time and effort to a review of this case.

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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Senior Solicitor

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APPENDIX

(Excerpt from Defendant's Memorandum in Opposition to Motion for Injunctive Relief, filed by Respondents in the U.S. District Court.)

TIME: 11:59:20

Dispatcher Southern

Officer	Yeah, give me the Southwest dispatcher.
Officer	Come on, come on, Jesus Christ
Officer	Son of a bitches ain't saying a goddamn word and they're not talking to me on the phone, not a fricking call.
Officer	They ain't done shit with it.
Dispatcher	Hello.
Officer	Yeah, Southwest?
Dispatcher	Yes it is.
Officer	Officer Fruhwirth, Southern District
Officer	Around 11:00, I just got home my wife was telling me. I live 2600 Deleany Street, there were a couple cars out in back of the house here shining spotlights up around the area, do you know what was going on?
Dispatcher	Well I got a call out in the area, but I can't think. I can't recall what it had been, but I knew I got a call up there, but I don't [sic] what was going on. Did she see officers up around there?

Officer	Yeah, she seen all kinds of spotlights. They were shining in my back yard and everything else, I want to know what the hell's going on.
Dispatcher	Oh no, I, I can't think of what happened on the other shift you know just went off. I don't know what happened. I really, I couldn't tell you, but I know I got a call up there.
Officer	Ok.
Dispatcher	Alright, sorry.
Officer	Do you believe this shit, I know I got a call up there's but I don't know what's going on. I don't remember. Fucking asshole niggers.

App. 3

(Notification to Accused of Complaints, served on Officer Fruhwirth on August 15, 1988.)

POLICE DEPARTMENT BALTIMORE, MARYLAND

TO: Officer Charles Fruhwirth, Southern District

FROM: Director, Internal Investigation Division

SUBJECT: NOTIFICATION TO ACCUSED OF COMPLAINTS

Be advised that a complaint has been lodged concerning a situation in which you were alleged to have been involved. The nature of the complaint as it is known is as follows:

It is alleged that on 13 Aug 88, while having a telephone conversation with Cadet Danier Thompson, communications division, you used profanity and racial slurs. This occured [sic] after you identified yourself as a police officer.

You are further advised that other issues may arise concerning this complaint as the investigation progresses at which time you will be informed as to their nature.

Investigators & Assignment:

Det Paul E Murphy

_____

_____

_____

Signed and received by:
Charles K. Fruhwirth
EOD: 4/4/79 Badge No. 772
Received: Date 15 Aug 88
Time 1409

_____